Supreme Court, U.S.
FILED
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No.

IN THE
SUPREME COURT
OF THE UNITED STATES

SAMANTHA BATES
Petitioner,

v.

CHARTER TOWNSHIP OF VAN BUREN,
a Michigan municipal corporation,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

SUPPLEMENTAL APPENDIX

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BATES v. TOWNSHIP OF VAN BUREN, 459 F.3d 731 (6th Cir. 2006)

Samantha BATES, Plaintiff-Appellant, v, TOWNSHIP OF VAN BUREN,

Defendant-Appellee.

No. 05-2137.

United States Court of Appeals, Sixth Circuit.

Argued: July 20, 2006.

Decided and Filed: August 21, 2006.

Petition for Rehearing Denied En Banc, November 13, 2006.

Appeal from the United States District Court for the Eastern
District of Michigan, Avern: Cohn, J.

ARGUED: Michael L. Donaldson, Livonia, Michigan, for Appellant. James N. McNally, Sommers Schwartz, Southfield, Michigan, for Appellee. ON BRIEF: Michael L. Donaldson, Livonia, Michigan, for Appellant. James H. McNally, Patrick B. McCauley, David J. Szymanski, Sommers Schwartz, Southfield, Michigan, for Appellee.

Before: GILMAN and COOK, Circuit Judges; DOWD, District Judge. [fn*]

COOK, J., delivered the opinion of the court, in which

DOWD, D.J., joined.

GILMAN, J. (pp.731-39), delivered a separate dissenting opinion.

[fn*] The Honorable David D. Dowd, Jr., United States District Judge for the Northern District of Ohio, sitting by designation.

OPINION

COOK, Circuit Judge.

Samantha Bates, a topless dancer at Leggs Lounge in the Township of Van Buren, Michigan, filed this § 1983 action challenging a town ordinance that prohibited nudity at "any establishment licensed or subject to licensing by the Michigan Liquor Control Commission." The district court stayed her case until the Michigan Court of Appeals - in an action to enjoin the bar's owner, The Garter Belt, Inc., from violating the ordinance - rejected the defense that the ordinance was unconstitutional. The district court then lifted the stay on this case and dismissed Bates's claims as res judicata. We find that the district court correctly applied the Michigan law of res judicata, and we accordingly affirm.

I.

On March 2, 1999, the Township of Van Buren enacted Ordinance 2-16-99(2), providing as follows:

> Nudity on Licensed Premises.
>
> (a) No person, while appearing in a state of nudity as defined by this section, shall frequent,

loiter, work for, or perform in any establishment licenced or subject to licensing by the Michigan Liquor Control Commission. No proprietor or operator of any such establishment shall allow the presence in such establishment of any person who violates the Provisions of this section.

(b) "Nudity" shall be defined to be the exposure by view of persons, of any of the following body parts, either directly or indirectly, including but not limited to exposure, see-through clothing articles or body stockings:

(1) the whole or part of the pubic region;

(2) the whole or part of the anus;

(3) the whole or part of the buttocks;

(4) the whole or part of the genitals;
(5) the breast area including nipple, or more than one-half of the area of the breast.

In November 2000, the township sought a permanent injunction requiring The Garter Belt to comply with the ordinance ("Garter Belt I"). The bar removed the case to federal court and filed a separate federal case challenging the constitutionality of the ordinance ("Garter Pelt 11"). The district court remanded Garter Belt I and abstained from (and dismissed) Garter Belt II on the basis of Younger v. Harris, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971), and in doing so rejected The Garter Belt's argument that abstention was inappropriate because it would preclude, at least until a writ of certiorari was granted by the Supreme Court, federal review of its constitutional claims. After the Sixth Circuit affirmed, Garter

Belt I was heard in state court. The Wayne County Circuit Court upheld the statute's constitutionality and issued a permanent injunction against the bar; the Michigan Court of Appeals affirmed, Charter Twp. of Van Buren v. Garter Belt, Inc., 258 Mich, App, 594, 673 N.W.2d 111 (2003), and the Michigan Supreme Court denied leave to appeal, 410 Mich, 880, 682 N.W 2d 86 (2004) - The United States Supreme Court denied certiorari. 543 U.S. 1002, 125 S.Ct. 620, 160 L.Ed.2d 462 (2004)

While the Garter Belt I litigation was proceeding, Bates filed this 42 U.S.C. § 1983 action in federal district court challenging the constitutionality of the ordinance. The case was stayed until certiorari was denied in Garter Belt I. The court then lifted the stay and requested briefing on "the impact of the state court's decision [in Garter Belt I] on Bates's claims and whether any doctrine(s) bar(s) [Bates] from litigating her claims in this forum."

The district, court barred Bates's action as res judicata. Although different parties were involved in the actions, in Michigan res judicata bars a subsequent action by the "same parties or their privies." Adair v. State, 470 Mich. 105, 680 N.W.2d 386, 396 (2004). The court held that Bates and The Garter Belt were in privity in part because they had a " substantial identity of interests'" - specifically, "the: the ordinance be struck down on constitutional grounds." Id. (citation omitted). Bates timely appealed. [fnl]

II.

The application of res judicata is a question of law that we review de novo. Browning v. Levy, 283 F.3d 761, 772 (6th Cir. 2002).

The "Full Faith and Credit statute," 28 U.S.C. § 1738, [fn2] requires federal courts in a § 1983 action to give state court judgments the same preclusive effect those judgments would have in the rendering state's courts. Migra v. Warren City Sch. Dist. Bd. of Educ., 465 U.S. 75, 80-82, 104 S.Ct. 892, 79 L.Ed. 2d 56 (1984) - The Michigan Supreme Court "has taken a broad approach to the doctrine of res judicata," determining that it "bars a second, subsequent action when (l) the prior action was decided on the merits, (2) both actions involve the same parties or their privies, and (3) the matter in the second case was or could have been, resolved in the first." Adair, 680N,W.2d at 396. The doctrine "bars not only claims already litigated, but also every claim arising from the same transaction that the parties, exercising reasonable diligence, could have raised but did not." Id.

Bates challenges only the district court's finding that she is in privity with The Garter Belt.

> To be in privity is to be so identified in interest with another party that the first litigant represents the same legal right that the later litigant is trying to assert. The outer limit of the doctrine traditionally requires both [1] a "substantial identity of interests' and [2] a "working functional relationship" in which [3] the interests of the nonparty are presented and protected by the party in the litigation. Id. (citations omitted)

In Adair, the Michigan Supreme Court barred as res judicata a challenge by taxpayers and school districts to the state's education funding plan. The Michigan Constitution required that the state neither (1) decrease its funding for mandate activities and services nor (2) impose new unfunded

mandates on local school districts. After several rounds of litigation concerning the first requirement, a new group of plaintiffs, including some school districts and taxpayers that had not been party to the first litigation, challenged the state funding plan as not complying with the second requirement. The Michigan Supreme Court dismissed the subsequent claims on the ground that they could have been reached in the earlier suit.

The court held that the plaintiffs who were not parties in the earlier litigation had "identical" interests to those who were because each sought the same declaratory relief.

> In litigation concerning the [Michigan Constitution's educational funding provisions], where a taxpayer or a local unit of government is suing the state, the issue is whether the Legislature's act is unconstitutional as it applies not just to a single local unit of government, but to all local units affected by the legislation. In such cases, the interests of all similar local units of government and taxpayers will almost always be identical. If the relief sought by one plaintiff to remedy a challenged action is indistinguishable from that sought by another, such as when declaratory relief is sought concerning an act of the Legislature establishing the proportion of state funding for local government units, the interests are identical.

Id. (emphasis added). Notwithstanding that the second group of plaintiffs were challenging the funding plan under a different constitutional provision, the court held that privity existed because each group of plaintiffs sought to have the state's funding plan declared unconstitutional.

The court in Adair did not explain how the parties maintained a "working functional relationship," the second component of the test for privity, and thus it is hard to see what force the requirement retains. (In contrast, the court did summarily assert that the interests of the nonparty were "presented and protected in the first litigation, the third component of the test for privity. Adair cited Phinisee v. Rogers, 229 Mich.App. 547 582 N.W.2d 352, 85-55 (1996), in which the court held that an illegitimate child's paternity claim was not barred as res judicata by her mother's failed paternity suit because the mother and daughter did not share a substantial identity of interests.[fn3J The court in Phinisee quoted a definition of privity in which the parties' having an actual relationship was a disjunctive requirement from their having an identity of interests:

> [Privity consists in] mutual or successive relationships to the same right of property, or such an identification of interest of one person with another as to represent the same legal right. [It] signifies that [the] relationship between two or more persons is such that a judgment involving one of them may justly be conclusive upon [the] other, although [the] other was not a party to lawsuit.

Black's Law Dictionary 1199 (6th ed. 1990) (emphasis added) [fn 4] Though it is not essential to our holding, we are confident that Adair' s requirement of a "working functional relationship" may be satisfied by "an identification of interest of one person with another as to represent the same legal right." Id.

Bates's case satisfies each of the components discussed in Adair. First, Bates and The Garter Belt had a substantial identity of interests because each sought a facial invalidation of the ordinance. It is of no moment that The Garter Belt was a

defendant in the earlier action whereas Bates is a plaintiff here; Adair speaks of "interests," and offers only as an example of parties with identical interests those who seek the same relief. Accordingly, Adair has often been invoked to bar later actions by parties who were previously defendants (or their privies) notwithstanding that they sought no relief in the earlier cases. See, e.g., Reed V. City of Detroit, 2005 WI 176665, No. 247557, 2005 Mich. App. LEXIS 172 (Mich.Ct.App. Jan. 27, 2005) (unpublished) (barring action by a subsequent owner - i.e., a privy of the prior owner - against the city based upon earlier tax foreclosure action against the prior owner). Nor do Bates's interests diverge from The Garter Belt's because she seeks damages in addition to declaratory relief. The only basis she alleges for such damages is the ordinance's facial unconstitutionality, so the substance of her complaint remains on all fours with The Garter Belt's defense in the earlier action. Second, Bates and The Garter Belt, the only club where she danced, had no less a "working functional relationship" than did the parties considered in Adair. Third, Bates's interests were presented and protected by The Garter Belt in the previous litigation. Had The Garter Belt avoided the injunction in any way, Bates would have been free to dance as she had before the ordinance's passage. And had The Garter Belt prevailed in its defense that the ordinance was facially unconstitutional, Bates would have had no reason to seek the same declaration.

Indeed, the case for privity is stronger here than it was in Adair, as Bates not only seeks the same declaration that the Michigan courts refused to make, but also prays for that relief with arguments identical to those that the Michigan courts rejected. In Garter Belt I, The Garter Belt opposed the injunction by arguing (among other things) that "the township's prohibition of nudity in establishments that serve alcohol [was] unconstitutionally overbroad." 673 N.W2d at 132.

And, as Bates's briefs make clear, and as her counsel confirmed at oral argument, Bates's only challenge is that the ordinance is overbroad. The Michigan courts rejected The Garter Belt's arguments that the ordinance would improperly prohibit plunging necklines, thong bikinis, and semi-nude theatrical performances such as Hair, Oh! Calcutta, Salome, and Dance of the Seven Veils. 673 N.W.2d at 132-34. Bates now asks this court to find the ordinance unconstitutional because it would prohibit plunging necklines, thong bikinis, and Hair, Oh! Calcutta, Salome, and Dance of the Seven veils. (See Bates Br. 33.) There is simply no way to consider her arguments without revisiting the very matter the Michigan courts decided and the United States Supreme Court refused to review.

Finally, we reject Bates's two arguments contesting the application of the doctrine of res judicata to bar her claims. First, Bates contends that in Dearborn Heights Sch. Dist. V Wayne County MEA/NEA, 233 Mich.App. 120, 592 N.W.2d 408 (1998), Michigan adopted the rule expressed by this court in Becherer v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 43 F.3d 1054, 1070 (6th Cir. 1995), that res judicata requires "the existence of an express or implied legal relationship in which the parties to [the] first suit are accountable to the nonparties who file a subsequent suit raising identical issues." Dearborn Heights, however, was published six years before Adair and cited Becherer only for the generic proposition that "a nonparty to an earlier proceeding will be bound by the result if that party controlled the earlier proceeding or if the party's interests were adequately represented in the original matter." 592 N.W.2d at 412. And Becherer itself did not purport to interpret Michigan law. Adair is the operative precedent, and it does not require there be an "express or implied legal relationship" making one party accountable to the other before an action is barred as res judicata.

We also reject Bates's contention that her claim should not be barred because her interests were not "actually presented" in Garter Belt I. As noted above, we see no daylight between Bates's interests - as expressed in this overbreadth challenge - and those represented by The Garter Belt in its defense that the statute was unconstitutionally overbroad. Moreover, if Bates's complaint is that particular arguments were not raised in the prior litigation, then it may be rejected on the ground that res judicata "bars not only claims already litigated, but also every claim arising from the same transaction that the parties, exercising reasonable diligence, could have raised but did not." Adair, 680 N.W 2d at 396. We remain convinced that Bates's interests were presented and protected in the prior litigation.

As a final point, we note that Bates has not challenged Michigan's res judicata doctrine as unconstitutional under Richards v. Jefferson County, 517 U.S. 793, 116 S,Ct. 1761, 135 L.Ed.2d 75 (1996). In Richards, the Court held that a state court's "extreme" application of state res judicata principles to bar a "stranger" to a previous judgment from pursuing her constitutional claims deprived that party of Fourteenth Amendment due process. 517 U.S. ,at 797, 802, 116 S.Ct. 1761. Richards did not concern a series of facial challenges, so it is quite possibly distinguishable from this case. Either way, the issue is not properly before the court, as Bates has not raised the argument.

III.

We affirm. the district court's dismissal of Bates's action a res judicata under Michigan law. Bates's case is ultimately doomed by the federalism interests expressed in the Full Faith and Credit statute, 28 U.S.C. § 1738, and, as the Supreme Court has recently reiterated, federal courts may not fashion exceptions to § 1738 to provide a federal forum to plaintiffs

who otherwise would be without one. See San Remo Hotel v. City and County of San Francisco, 545 U.S. 323, 125 S.Ct. 2491, 162 L.Ed. 2d 315 (2005).

[fn1] On November 15, 2005, a panel of this circuit denied Bates's motion to remand her case to the district court for reconsideration in light of Odle v. Decatur County, Tennessee, 421 F. 3d 386 (6th Cir. 2005), and Deja Vu of Nashville, Inc. v. Metro. Gov't of Nashville and Davidson County, Tennessee, 421 F. 3d 417 (6th Cir. 2005). Bates v. Twp. of Van Buren, No. 05-2137 (6th Cir. Nov. 15, 2005). The panel noted, "Upon consideration, we conclude this argument [regarding Odle or Deja Vu] should be presented as part of the merits of this appeal." In Odle, the court struck down as unconstitutionally overbroad a Tennessee county ordinance that "prohibit[ed] nudity and sexually suggestive conduct at a wide range of public places where alcohol is sold, served, or consumed" on the ground that the county failed to support the breadth of the ordinance, 421 F. 3d at 388. In Deja Vu, the court affirmed the principle that Odle should be given retroactive effect in all cases on direct review. 421 F. 3d at 420. Neither case concerned Michigan's res judicata rules. Because we affirm the district court's judgment on that basis, we do not address Odle, Deja Vu, or in any other way the merits of Bates's claims.

[fn2] "the records and judicial proceedings of any court of any such state...shall have the same full faith and credit in every court within the United States...as they have by law or usage in the courts of such State...from which they are taken."

[fn3] See Phinisee, 582 N.W. 2d at 855 ("We also agree with those courts that have recognized that an illegitimate child's interests in establishing paternity, which may extend not only to immediate support payments but also to future social security benefits and inheritance through the biological father, differ from

the mother's interests in establishing paternity, which may be focused more on immediate financial concerns.").

[fn4] In contrast, the Fourth Edition defined privity as simply "Mutual or successive relationships to the same rights of property." Black's Law Dictionary 1361 (rev. 4th ed. 1968).

RONALD LEE GILMAN, Circuit Judge, dissenting.

The majority's decision in this case leads to an unnecessarily broad and perverse result - that once the Michigan courts have determined that a state statute complies with the federal Constitution, the federal courts are precluded from ever passing on the issue. In applying Michigan's res judicata principles, the majority extends the case of Adair v. State of Michigan, 470 Mich 105, 680 NW 2d 386 (2004), to encompass any plaintiff who mounts a facial challenge to The Township's nudity ban. Although I agree with the majority that we must apply Michigan's res judicata principles, I disagree with the majority's interpretation of Adair. I do not believe that all subsequent plaintiffs who might wish to challenge the Township's nudity ordinance should be precluded on the basis of res judicata from seeking a federal ruling on whether the ordinance violates the First Amendment. The majority's holding is especially unsatisfying in this case because this circuit has recently held that a similar Tennessee nudity ban was unconstitutionally overbroad. See Odle v. Decatur County, Tennessee, 421 F. 3d 386 (6th Cir. 2005) (overturning an ordinance that "prohibits, among other things, nudity and the performance of a wide range of arguably sexually suggestive acts in 'public places where intoxicating liquors are offered for sale, served or consumed.'").

In Adair, the Michigan Supreme Court held that privity requires a "'substantial identity of interests' and a 'working functional relationship' in which the interests of the nonparty are presented

and protected by the party in the litigation." 680 NW 2d at 396. Applying this test, the Adair Court held that similarly situated school districts and taxpayers were in privity because they all sought to "establish[] the proportion of state funding for local government units" and to ensure that "mandated activities are funded as they are required to be under the Headlee Amendment." Id. at 396-97 (italics omitted).

The majority in the case before us interprets Adair to stand for the proposition that all plaintiffs who facially challenge the same ordinance are in privity for res judicata purposes. See Maj. Op. At p. 736 ("Bates and The Garter Belt had a substantial identity of interests because each sought a facial invalidation of the ordinance.") It also denigrates the "working functional relationship" prong of Adair by commenting that "it is hard to see what force the requirement retains," Maj. Op. at p. 735, and conflates the two prongs of Michigan's test for privity by allowing the "relationship" prong to "be satisfied by an identification of interest of one person with another as to represent the same legal right." Id. (Citation and quotation marks omitted.)

I do not believe that the majority has properly interpreted Adair. In Adair, the local school districts did not challenge the facial constitutionality of an ordinance; they instead sought a ruling on whether one specific defendant - the state - was complying with the requirements of the Michigan Constitution, and specifically pursued a determination of which programs must be funded by the state. This resembles an "as-applied" challenge far more than a facial challenge. Each school district essentially stood in each other's shoes with respect to enforcing funding requirements against the state.

In addition, the majority opinion glosses over a key portion of Adair's reasoning, which reads as follows:

> "We find that the school districts...also have the same legal interest protected by the Duran I plaintiffs and are similarly in privity. In this case, particularly because only declaratory relief, not damages, was sought, it is evident that all school districts have the same interest."

Adair, 680 NW 2d at 397 (emphasis added). In other words, the local school districts were in privity with each other for res judicata purposes because they all sought the same legal relief; namely, a declaratory judgment regarding mandated funding requirements under the Michigan Constitution. See id. at 396 (holding that interests are identical if "the relief sought by one plaintiff to remedy a challenged action is indistinguishable from that sought by another".)

In the present case, however, Bates and The Garter Belt did not seek the identical legal relief. The Garter Belt invoked the First Amendment as a defense in order to prevent The Township from requiring The Garter Belt to comply with its nudity ordinance. Charter Twp. of Van Buren v. Garter Belt, Inc., 258 Mich App 594, 597; 673 NW 2d 111 (Mich. App. 2003). Bates, in contrast, seeks not only a declaration that The Township's nudity ban is unconstitutional, but also $50,000 in compensatory damages. The majority argues that Bates's damages claim does not render this case distinguishable from Adair because "[t]he only basis [Bates] alleges for such damages is the ordinance's facial unconstitutionality." Maj. Op. at p. 736 (emphasis in original). This proves too much, however, because individual damages always flow from the violation of the legal right at issue.

I believe that the decision in Adair stemmed from the fact that a declaratory judgment was the only relief sought by the various school districts. 680 NW 2d at 397. A party seeking damages, however, has a qualitatively different interest than a party

seeking only declaratory relief. Cf. Phinisee v. Rogers, 229 Mich App 547, 582 NW 2d 852, 855 (1998) (holding that an illegitimate child's interest in establishing paternity is not substantially identical to her mother's interest because "an illegitimate child's interests in establishing paternity, which may extend not only to immediate support payments but also to future social security benefits and inheritance through the biological father, differ from the mother's interests in establishing paternity, which may be focused more on immediate financial concerns"). In addition, the majority's opinion unnecessarily eviscerates the "working functional relationship" portion of Adair's preclusion test, even though Bates and The Garter Belt literally possessed a working relationship.

Because the Michigan Supreme Court recognizes that its ruling in Adair represents the "outer limit of the doctrine" of res judicata, 680 NW 2d at 396, I would decline to apply Adair in a case that is distinguishable on multiple grounds. In my opinion, the more prudent course would be to avoid increasing the already broad scope of Adair, whose holding may raise due process concerns that Bates has not sought to pursue. I therefore respectfully dissent.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

SAMANTHA BATES,
Plaintiff,
vs. Case No. 02-73692

TOWNSHIP OF VAN BUREN HON. AVERN COHN
Defendant.
_____/

MEMORANDUM AND ORDER
GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT
AND
DENYING PLAINTIFF'S CROSS MOTION FOR SUMMARY JUDGMENT [1]

I. Introduction

This is a civil case under 42 U.S.C. § 1983. Plaintiff

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1 The Court originally scheduled this matter for hearing. Upon review of the parties' papers, however, the Court finds that oral argument is not necessary. See E.D. Mich. LR 7.1(e)(2).

2 Bates also claims that Township Ordinances 22-106 through 22-112 were unconstitutional. However, as Van Buren Township notes, these ordinances were superceded and replaced by Township Ordinance 02-16-99(2). The only ordinance at issue therefore is Township Ordinance 02-16-99(2), as Bates conceded in her summary judgment papers.

Samantha Bates (Bates) sued defendant Van Buren Township claiming that Township Ordinance 2-16- 99(2),[2] entitled Nudity on License Premises (the ordinance), violates her First and Fourteenth Amendment rights. Bates an exotic/topless dancer at the Garter Belt. Inc. d/b/a Legg's Lounge (the Garter Belt) located in the township and licensed to sell alcoholic beverages.

In 2003, the parties filed the cross motions fur summary judgment. Although both parties spent a good deal of effort arguing the merits of the case, the constitutionality of the ordinance was being considered by the Michigan Court of Appeals in a parallel proceeding by the Garter Belt, the establishment where Bates works. Accordingly, the Court dismissed the case without prejudice based on the abstention doctrine in Colorado River Water Conservation Dist v. United States, 424 U.S. 800 (1976).

Bates appealed. The Court of Appeals for the Sixth Circuit affirmed the decision to abstain, but modified the Court's decision to require a stay of proceedings rather than a dismissal without prejudice. Bates v. Van Buren Township, No, 03-2258, 2004 WL 2792483 (6th Cir. Dec. 6, 2004) (unpublished) (per curiam). The mandate issued on December 28, 2004. On January 4, 2005, the Court modified its decision and directed that the case be stayed.

Bates then flied a motion to lift the stay and allow supplemental briefing on the summary judgment motions. The Court granted the motion. See Order filed April 15, 2005.he parties filed supplemental briefs. The matter is now ready for decision. For the reasons that follow, Van Buren Township's motion for summary judgment is GRANTED and Bates motion

for partial summary judgment is DENIED. The case is DISMISSED under the doctrine of res judicata.

II. Background[3]

A. The Ordinance

In 1999, Van Buren Township enacted a series of ordinances addressing sexually oriented business, commonly called SOB ordinances.. The ordinance at issue here was one such SOB ordinance known as Ordinance No. 02-16-99(2) (§ 6-69 of Van Buren Township's code of ordinances). It provides, in relevant part as follows:

> Nudity on Licenced Premises.
>
> (1) No person, while appearing in a state of nudity as defined by this section, shall frequent, loiter, work or perform in any establishment licensed or subject to licensing by the Michigan Liquor Control Commission. No proprietor or operator of any such establishment shall allow the presence in such establishment of any person who violates the provisions of this section.
> (2) "Nudity" shall be defined to be the exposure by view of persons, of any of the following body parts, either directly or indirectly, including but not limited to exposure, see-through clothing articles or body stocking:
> (a) the whole or part of the pubic region;

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3 This Background is taken from the Courts April 15, 2005 Order.

(b) the whole or part of the anus;
(c) the whole or part of the buttocks;
(d) the whole or part of the genitals;
(e) the breast area including nipple, or more than one-half of the area of the breast.

B. Enforcement Efforts

Dancers at the Garter Belt, including Bates, regularly have exposed their "breast area including nipple, or more than one-half of the area of the breast" while patrons were served alcoholic beverages both before and after the Nudity ordinance was enacted. On August 29, 2000, Van Buren Township sent a letter to the owner of the Garter Belt stating that the Garter Belt was in violation of the ordinance and asked that the violations stop.

C. Court Actions

The Garter Belt apparently did not comply because Van Buren Township filed suit in Wayne County Circuit Court on November 6, 2000, seeking a permanent injunction that would require the Garter Belt to comply with the ordinance. (Garter Belt I). The Garter Belt raised the defense that the ordinance is unconstitutional.

On December 13, 2000, the Garter Belt removed the case to federal court where it was assigned to another judge in this district. Charter Township of Van Buren v. The Garter Belt, No. 00-75395. Two weeks later, on December 28, 2000, the Garter Belt filed a case in federal court against Van Buren Township challenging the scheme of Van Buren Township's SOBs, including the constitutional validity of the ordinance (Garter Belt II). The Garter Belt, Inc. v. Charter Township of Van Buren, No. 00-75630. Garter Belt I and Garter Belt II were consolidated and heard before the same judge.

In Garter Belt I, following an order to show cause, the court remanded the case to Wayne County Circuit Court for lack of subject matter jurisdiction on the grounds that the Garter Belt's federal defenses to the ordinances (that it is unconstitutional) do not provide a basis for federal jurisdiction. See Order Remanding Case to Wayne County Circuit Court For Lack of Subject Matter Jurisdiction and Denying Plaintiffs' Motion to Remand as Moot, filed January 18, 2001, case no. 00-75395.

In Garter Belt II, the court granted Van Buren Township's motion to dismiss on the grounds that the court should abstain from hearing the case in deference to Garter Belt I which gave the Garter Belt an adequate opportunity to present all of its claims, state and federal, regarding the ordinance. See Opinion and Order Granting Defendants' Motion to Dismiss, filed June 28, 2001, case no. 00-765630. The Garter Belt appealed the dismissal. The Court of Appeals for the Sixth Circuit affirmed the district court's decision. Garter Belt, Inc. v. Van Buren Township, No. 01-2093, 2003 WL 21277356 (6th Cir. June 2, 2003) (unpublished).

Following dismissal of Garter Belt II, the Garter Belt and Van Buren Township continued to litigate Garter Belt I in state court. On December 11, 2001, the Wayne County Circuit Court entered a Judgment and permanent injunction against the Garter Belt, stating in part that the ordinance "is without constitutional or legal infirmity" and dismissed the Garter Belt's counterclaims.

The Garter Belt appealed this decision to the Michigan Court of Appeals, raising several claims, including constitutional claims. On September 25, 2003, the Michigan Court of Appeals affirmed the circuit court's decision in a published decision. Charter Township of Van Buren v. Garter Belt, Inc. 258 Mich. App 594 (2003). The Michigan Supreme Court denied leave to appeal. 470 Mich 880 (2004). On November 29, 2004, the United States Supreme Court denied certiorari. 125 S. Ct. 620

(2004).

Following the denial of certiorari, Bates filed a motion to lift the stay and allow supplemental briefing on the summary judgment motions. Bates specifically noted that "new case law" existed which supported her claims. The Court granted the motion. See Order filed April 15, 2005. As to supplemental briefing, the Court stated that "[b]oth parties shall address the issue of the impact of the state court's decision on Bates' claims and whether any doctrine(s) bar(s) her from litigating her claims in this forum." Order at p. 5.

III. Legal Standard

Summary judgment will be granted when the moving party demonstrates that there is "no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56. There is no genuine issue of material fact when "the record taken as a whole could not lead a rational trier of fact to find for the non-moving party." Matsushita Elec. Indus. Co. v. Zenith Radio Corp, 475 U.S. 574, 587 (1986).

The non-moving party may not rest upon his pleadings; rather, the non-moving party's response "must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e). Showing that there is some metaphysical doubt as to the material facts is not enough; "the mere existence of a scintilla of evidence" in support of the nonmoving party is not sufficient to show a genuine issue of material fact. Anderson v. Liberty Lobby, Inc. 477 U.S. 242, 252 (1986). Rather, the nonmoving party must present "significant probative evidence" in support of its opposition to the motion for summary judgment in order to defeat the motion. See Moore v. Philip Morris Co., 8 F. 3d 335, 340 (6th Cir. 1993); see also Anderson, 477 U.S. at 249-50. Additionally, and significantly, "affidavits containing mere conclusions have no probative value" in summary

judgment proceedings. Baharah v. Eltra Corp., 394 F. 2d 502, 503 (6th cir. 1968).

The Court must decide "whether the evidence presents a sufficient disagreement to require submission to a [trier of fact] or whether it is so one-sided that one party must prevail as a matter of law." In re Dollar Corp., 25 F. 3d 1320, 1323 (6th Cir. 1994) (quoting Anderson, 477 U.S. at 251-52). The Court "must view the evidence in the light most favorable to the non-moving party." Employers Ins. of Wausau v. Petroleum Specialties, Inc. 69 F. 3d 98, 101 (6th Cir. 1995). Determining credibility, weighing evidence, and drawing reasonable inferences are left to the trier of fact. See Anderson, 477 U.S. at 255. Only where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law may summary judgment be granted. Thompson v. Ashe, 250 F. 3d 399, 405 (6th Cir. 2001).

IV. Analysis

As an initial matter, in Bates's supplemental response she says that she is challenging the ordinance on First Amendment grounds; she does not refer to the Fourteenth Amendment. She states: "Bates challenges the Van Buren Township anti-nudity ordinance on the grounds that it restricts her First Amendment right of free speech, Bates is a dancer. It is her expression, communication, and speech that the ordinance was designed to prohibit." Supplemental brief at p. 2.

A. Parties' Arguments - Preclusion/Abstention

Van Buren Township says that Bates is barred from litigating her federal claims in this court by the doctrines of res judicata and Rooker-Feldman. Bates says that these doctrines, as well as any other preclusion/abstention doctrines do not bar her claims. The Court will address only the doctrine it finds applicable.

B. Res Judicata

The parties agree that state law determines whether the first-issued state court decision will have preclusive effect on this forum. See United States v. Dominguez, 359 F. 3d 839, 841 (6th Cir. 2004).

The doctrine of res judicata is employed to prevent multiple suits litigating the same cause of action. The doctrine bars a second, subsequent action when (1) the prior action was decided on the merits, (2) both actions involve the same parties or their privies, and (3) the matter in the second case was, or could have been, resolved in the first. Sewell v. Clean Cut Mgt. Inc., 463 Mich 569, 575 (2001). The Michigan Supreme Court "has taken a broad approach to the doctrine of res judicata, holding that it bars not only claims already litigated, but also every claim arising from the same transaction that the parties, exercising reasonable diligence, could have raised but did not." Adair v. State of Michigan, 470 Mich 105, 120 (2004) (citing Dart v. Dart, 460 Mich 573, 586, 597 N.W. 2d 82 (1999)).

Examing the Sewell faactors, the only element Bates contests is the second element - that the parties in the later suit be the same or be those in privity with them. Bates argues that she was not a party to Garter Belt I, that she was not a necessary party to the state court action, she was not notified by Van Buren Township of the state court action, and she is an independent contractor who rents space from the Garter Belt. Bates' argument implicates the scope of the concept of "privity."

The Michigan Supreme Court recently explained the concept of privity in the context of res judicata:

> To be in privity is to be so identified in interest, with another party that the first litigation represents the same legal right that the later litigant is trying to assert. Baraga Co. v. State Tax Comm., 466 Mich 264, 269-270, 645 N.W.

> 2d 13 (2002). The outer limit of the doctrine traditionally requires both a "substantial identity of interests" and a "working functional relationship" in which the interests of the nonparty are presented and protected by the party in the litigation. Id., quoting Baraga Co. v. State Tax Comm., 243 Mich App 452, 456, 622 N.W. 2d 109 (2000), citing Phinisee v. Rogers, 229 Mich App 547, 553-554, 582 N.W. 2d 852 (1998)...
>
> Thus, for the purposes of the second Sewell factor, a perfect identity of the parties is not required, only a "substantial identity of interests" that are adequately presented and protected by the first litigant...

Adair, 470 Mich at 122 (emphasis added.)

Here, Bates and the Garter Belt clearly have a "substantial identity of interests:" that the ordinance be struck down on constitutional grounds. Bates works at the very establishment which litigated the case in state court. Bates' interest was presented and protected by the Garter Belt before the Michigan courts. Indeed, the Garter Belt presented a First Amendment challenge to the ordinance. The Garter Belt argued that the ordinance constituted a prior restraint on the First Amendment. The Michigan Court of Appeals disagreed, stating:

> Although being "in a state of nudity" is not an inherently expressive condition," Pap's, supra at 289, 120 S. Ct. 1382 nonobscene nude dancing may be a form of expression falling within the outer limits of the First Amendment. Jott, supra at 526, 569 N.W. 2d 841, citing Barnes, supra at 565-566, 111 S. Ct. 2456. On the other hand, the First Amendment does not protect nude

> dancing involving lewd, sexual activity. Michigan ex rel Wayne County Co. Prosecutor v. Dizzy Duck, 449 mich. 353, 360-361, 365, 535 NW. 2d 178 (1995). So a censor's effort to ban nude dancing because it is obscene may experience difficulties in separating nonobscene expressive conduct from obscene nude dancing. **Defendant's argument fails because neither plaintiff's ordinance nor the injunction at issue here totally bans nude dancing on the basis that it is obscene; the ordinance and the order to comply with the ordinance only prohibit nude dancing at a place where liquor is sold**. Jott, supra at 538, 569 N.W. 2d 841. The "critical fact is that [the ordinance and the injunction enforcing it] has not forbidden [nude dancing] across the board." Id., quoting LaRue, supra at 118, 93 S. Ct. 390.

Garter Belt I, 258 Mich at 624-25 (emphasis added). Thus, the Garter Belt raised the very claim Bates seeks to raise here - that the ordinance violates the First Amendment. Under these circumstances, Bates is in privity with the Garter Belt for purposes of res judicata.

It is noted that the Sixth Circuit, in remanding the case for entry of stay order, indicated that Bates' suit may be able to proceed in federal court following the conclusion of Garter Belt I:

> Because Colorado River abstention is temporary, federal courts will often eventually hear a case they have abstained from deciding. Colorado River abstention is temporary because all the reasons for it dissipate once the state court proceedings have run their course. At that

> point, if any party still has a claim for which it is entitled to a federal forum, and it is not barred by res judicata or a similar doctrine, it may return to federal court. Because, under Colorado River abstention, the parties in the state and federal proceedings need not be identical, the federal suit will normally not be barred by res judicata and federal litigation may resume if the state courts do not moot the issue on state law grounds.

Bates v. Van Buren Township, slip op. at p. 10 (footnotes omitted). The Sixth Circuit's statements are dicta and cannot be construed, as Bates suggests, to mean that she is not barred by res judicata from litigating her claim in this forum. The Sixth Circuit's statements do not take into consideration Michigan law, set forth above, which does not require the same parties for purposes of res judicata. Moreover, the Sixth Circuit's statements are equivocal, not definitive, and even indicate that res judicata may apply.

Although Bates does not challenge the application of the other elements for res judicata, it is worth noting that the elements are satisfied. The Garter Belt I was decided on the merits, and as stated above, the same issue was presented and decided by the Michigan Court of Appeals. In short, Bates is barred by res judicata from litigating her claim in federal court.

SO ORDERED.

Dated: July 25, 2005

s/Avern Cohn
AVERN COHN
UNITED STATES DISTRICT JUDGE

I hereby certify that a copy of the foregoing document was sent

to counsel of record on this date, July 25, 2005, by electronic and/or ordinary mail.

s/Julie Owens
Case Manager, (313) 234-5160